UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 238

Docket No. DC-0752-10-0268-I-1

Tamela Futrell-Rawls,

Appellant,

v.

Department of Veterans Affairs,

Agency.

December 8, 2010

Tamela Futrell-Rawls, Baltimore, Maryland, pro se.

Xan DeMarinis, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review from the initial decision that dismissed her appeal as settled. For the reasons set forth below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS the appeal for further adjudication.

BACKGROUND

¶2 Effective January 29, 2010, the agency removed the appellant from her part-time position as a Registered Respiratory Therapist, GS-8, based on charges of failure to follow instructions, failure to follow leave procedures, absence

without leave, and conduct unbecoming. Initial Appeal File (IAF), Tab 5, Subtabs 4a and b. On appeal, the appellant challenged the action and alleged that, in taking it, the agency had discriminated against her based on her disability. IAF, Tab 1 at 3-4. She did not request a hearing. *Id.* at 2.

¶3 During the March 3, 2010, close-of-record telephone conference, the administrative judge announced that, after discussions, the parties had reached an agreement to settle the case. IAF, Tab 8 (tape recording of telephone conference); Petition for Review File (PFR File), Tab 3, Exhibit A (transcript of telephone conference). During the conference, the administrative judge asked the agency representative to state the terms of the agency's offer. *Id.* The representative stated that the agency would allow the appellant to resign from her position, effective January 29, 2010, and would revise her SF-50 to reflect a resignation for personal reasons. *Id.* The agency representative responded affirmatively to the administrative judge's question as to whether the appellant's Official Personnel File would be expunged of evidence of the removal action. *Id.* The administrative judge then asked the appellant if she had any questions for the agency representative and whether she understood and accepted the offer, and she answered that she accepted the offer and had no questions. *Id.* The administrative judge concluded the telephone conference by stating that she would place the recording in the file, that the case would be regarded as settled based on the tape-recorded terms, and that she would issue a short decision indicating that the case was dismissed as settled. *Id.*

¶4 In her March 4, 2010 initial decision, the administrative judge stated that the parties had reached an agreement to settle the appeal, and that the oral agreement was recorded and a copy entered into the record. IAF, Tab 9, Initial Decision (ID) at 1. The administrative judge further stated that she had reviewed the agreement and was satisfied that it was lawful on its face and freely reached by the parties, and that they understood its terms. *Id.* She determined that it was enforceable by the Board, and she dismissed the appeal as settled. ID at 1-2.

¶5 After the March 3, 2010 telephone conference, the agency prepared a written settlement agreement and sent a copy to the appellant for her signature. PFR File, Tab 3, Exhibit B. In a letter mailed on March 6, 2010, the appellant advised the administrative judge that she had decided not to sign the agreement and that there was no benefit to her in the agreement because there was no provision for compensatory damages for the "mental and financial stress" she had been through.[1] IAF, Tab 10. She requested that her case be reopened and her appeal continued. *Id.* The record does not include a response to the appellant's March 6, 2010 letter.

¶6 In her timely-filed petition for review, the appellant argues that the administrative judge failed to consider certain matters, including that there was currently an open equal employment opportunity (EEO) investigation, that the agency was "late submitting paperwork," that there was no discovery process, and that a medical statement "attached"[2] showed that she could not perform her duties as a Respiratory Therapist "due to restrictions." PFR File, Tab 1 at 4. The appellant also challenged the merits of the removal action. *Id.* at 5. In addition, she stated that there were terms in the settlement agreement that the parties had not discussed during the telephone conference. *Id.* She specifically mentioned that the agreement required her to "dismiss, waive and forfeit/forever discharge the agency" from claims she wished to pursue, including EEO matters and Privacy Act violations. *Id.*

¶7 In response, the agency urged the Board to deny the appellant's petition for review on the grounds that she was simply attempting to repudiate the enforceable oral agreement. *Id.*, Tab 3 at 5. With its response, the agency

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[1] The appellant apparently sent a similar, although not identical letter, to the agency representative. PFR File, Tab 3, Exhibit C.

[2] No medical statement was, in fact, attached to the appellant's petition for review. PFR File, Tab 1.

submitted a copy of the transcript from the telephone conference, *id.* at Exhibit A, and a copy of the written settlement agreement it had sent to the appellant. *Id.* at Exhibit B.

ANALYSIS

¶8 In Board actions, as in civil actions, public policy favors settlement agreements, which serve to avoid unnecessary litigation and to encourage fair and speedy resolution of issues. *Lee v. Office of Personnel Management*, 83 M.S.P.R. 236, ¶ 3 (1999); *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981), *modified on other grounds by Shaw v. Department of the Navy*, 39 M.S.P.R. 586 (1989), *overruled in part on other grounds by Joyce v. Department of the Air Force*, 74 M.S.P.R. 112 (1997), *reversed on other grounds by Joyce v. Department of the Air Force*, 83 M.S.P.R. 666 (1999). However, before dismissing an appeal based on a settlement agreement, an administrative judge must document for the record that the parties reached a settlement agreement, understood its terms, and agreed whether or not it was to be enforceable by the Board. *Mahoney v. U.S. Postal Service*, 37 M.S.P.R. 146, 148-49 (1988). Oral settlement agreements are valid before the Board, and the same requirements apply to oral settlements as well as written settlements. *Parks v. U.S. Postal Service*, 113 M.S.P.R. 60, ¶ 11 (2010). Absent a formal withdrawal of an appeal, however, and until the parties have agreed on the specific terms of the settlement agreement, the act of finality constituting a settlement has not occurred. *Lee*, 83 M.S.P.R. 236, ¶ 3; *Smith v. Department of the Navy*, 37 M.S.P.R. 132, 136 (1988).

¶9 Here, as noted, after asking the agency representative to recite the terms of the agency's settlement offer, the administrative judge asked the appellant if she had any questions and whether she understood and accepted the agency's offer. *Id.*, Tab 8 (tape recording of telephone conference); PFR File, Tab 3, Exhibit A (transcript of telephone conference). Although the appellant answered that she

accepted the agency's offer and had no questions, she never stated that she was withdrawing her Board appeal. *Id.*

¶10 Moreover, the appellant took actions shortly thereafter which suggest that she did not understand the oral agreement and its implications.[3] As noted, in her March 6, 2010 letter, the appellant stated that, after reviewing the settlement agreement prepared by the agency, she had decided not to sign it and was moving forward with reopening/pursuing her Board appeal. IAF, Tab 10. Contrary to the agency representative's statements in her affidavit, the written agreement she sent to the appellant for her signature did not memorialize the terms of the agreement set forth during the telephone conference. PFR File, Tab 3; Exhibits A and B. Rather, the 6-page document imposed additional requirements upon the appellant, including that she withdraw discrimination complaints, grievances, and all other causes of action against the agency, and that she dismiss, release, forfeit and forever discharge the agency from any and all actions, before the MSPB, regarding any claim that was or could have been raised. *Id.*, Exhibit B. Further, the written agreement stated that it superseded all prior written or oral and all contemporaneous oral agreements and understandings relating to the subject matter of the appeal. *Id.*

¶11 In view of the above, we find that the administrative judge dismissed the appeal with insufficient evidence of the parties' intent to enter into a settlement agreement. The oral agreement did not contain a provision stating that the appellant would withdraw her appeal, and it does not appear that she believed she

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[3] According to the Certificate of Service, the Board's Legal Assistant served the initial decision on the appellant by regular mail on March 4, 2010. IAF, Tab 9. The appellant mailed letters challenging the agreement to the agency representative and the administrative judge on March 6, 2010. PFR File, Tab 3, Exhibit C; IAF, Tab 10. Board precedent and regulations recognize that documents placed in the mail are presumed to be received in 5 days. *See Matott v. Office of Personnel Management*, 93 M.S.P.R. 637, ¶ 11, *review dismissed*, 85 F. App'x 203 (Fed. Cir. 2003); 5 C.F.R. § 1204(l). Arguably, then, the appellant had not received the initial decision dismissing her appeal as settled at the time she mailed her letters.

had done so or that she otherwise understood the terms of the agreement. Nor did the oral agreement, as described by the agency representative during the telephone conference, indicate that the parties wished for it to be included in the record for enforcement purposes, even though the administrative judge stated in the initial decision that the agreement was enforceable by the Board. ID at 1-2; *Id.*, Tab 8 (tape recording of telephone conference); PFR File, Tab 3, Exhibit A (transcript of telephone conference). In sum, although an oral agreement is valid in Board proceedings, *Parks v. U.S. Postal Service*, 113 M.S.P.R. 60, ¶ 11, in light of the record evidence in this case, we find that there is insufficient evidence to find that a settlement of any type was reached between these parties.

ORDER

¶12 The appeal is remanded for adjudication on the merits.[4]

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

[4] In view of this disposition, we need not address the appellant's remaining arguments on petition for review.